

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

GARY PRESTON PRICE v. TONY PARKER, WARDEN

**Appeal from the Criminal Court for Sullivan County
Nos. C56, 519 Robert H. Montgomery, Jr., Judge**

No. E2009-01202-CCA-R3-HC - Filed October 12, 2009

The pro se petitioner, Gary Preston Price, appeals the Sullivan County Criminal Court's summary dismissal of his petition for a writ of habeas corpus. The state has filed a motion requesting that this court affirm the trial court's denial of relief pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Following our review, we conclude that the state's motion is well-taken, and the judgment of trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed
Pursuant to Rule 20, Rules of the Court of Criminal Appeals**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Gary Preston Price, Tiptonville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; H. Greeley Wells, District Attorney General; and Barry P. Staubus, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

MEMORANDUM OPINION

The petitioner pled guilty to second degree murder and, pursuant to a plea agreement, was sentenced as a Range I offender to twenty-one years, at 100% service. The petitioner then filed a motion for reduction of sentence and a subsequent amended petition, both of which were treated as post-conviction petitions. After counsel was appointed, the petitioner withdrew his petition for post-conviction relief. The petitioner then filed a pro se petition for a writ of habeas corpus.

The petition for a writ of habeas corpus alleges that his sentence of twenty-one years is illegal because the trial court sentenced him above the minimum range without finding enhancement factors on the record. The petitioner contends that this failure to note enhancement factors on the record

violates Blakely v. Washington, 542 U.S. 296 (2004) and Cunningham v. California, 549 U.S. 270 (2007). The state filed a motion to dismiss for failure to state a cognizable claim. The habeas corpus court summarily granted the motion to dismiss. The petitioner now appeals, and the state has filed a motion asking this court to affirm the judgment of the habeas corpus court pursuant to Rule 20 of the Rules of the Court of Criminal Appeals.

Tennessee law provides that “[a]ny person imprisoned or restrained of his liberty under any pretense whatsoever . . . may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment.” Tenn. Code Ann. § 29-21-101. Habeas corpus relief is limited and available only when it appears on the face of the judgment or the record of proceedings below that a trial court was without jurisdiction to convict the petitioner or that the petitioner’s sentence has expired. Archer v. State, 851 S.W.2d 157, 164 (Tenn. 1993). To prevail on a petition for a writ of habeas corpus, a petitioner must establish by a preponderance of the evidence that a judgment is void or that a term of imprisonment has expired. See State ex rel. Kuntz v. Bomar, 214 Tenn. 500, 504, 381 S.W.2d 290, 291-92 (1964). If a petition fails to state a cognizable claim, it may be dismissed summarily by the trial court without further inquiry. See State ex rel. Byrd v. Bomar, 214 Tenn. 476, 483, 381 S.W.2d 280, 283 (1964); Tenn. Code Ann. § 29-21-109. We note that the determination of whether to grant habeas corpus relief is a matter of law; therefore, we will review the habeas corpus court’s finding de novo without a presumption of correctness. McLaney v. Bell, 59 S.W.3d 90, 92 (Tenn. 2001).

In Blakely, 542 U.S. at 301, 124 S. Ct. at 2536, the Supreme Court held that any fact other than that of a prior conviction used to enhance a defendant's sentence must be proven to a jury beyond a reasonable doubt. The petitioner’s claim of an erroneously enhanced sentence is not cognizable in a habeas corpus case because the claim, even if proven, would render the judgment voidable, not void. See Ulysses Richardson v. State, No. W2006-01856-CCA-R3-PC, 2007WL1515162, at *3 (Tenn. Crim. App. May 24, 2007), app. denied (Tenn. Sept. 17, 2007) (stating that “even a valid Blakely claim renders a conviction voidable, not void, and is thus non-cognizable in habeas corpus review”). Additionally, this Court has repeatedly held that Blakely and its progeny did not create a new rule of law entitled to retroactive application in the context of a collateral, habeas corpus proceeding. See, e.g., Gary Wallace v. State, No. W2007-01949-CCA-R3-CO, 2008WL2687698, at *2 (Tenn. Crim. App. Jul. 2, 2008); Glen Cook v. State, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at *10 (Tenn. Crim. App. Mar. 27, 2008); Billy Merle Meeks v. Ricky J. Bell, Warden, No. M2005-00626-CCA-R3-HC, 2007WL4116486, at *7 (Tenn. Crim. App. Apr. 7, 2008). The petitioner has stated neither a claim of a void judgment, that is, one that the trial court was without authority to enter, nor one of an expired sentence. The trial court properly dismissed the petition.

We also note that the petitioner pled guilty and was sentenced pursuant to a plea agreement; therefore, the trial court is not required to find enhancing factors when sentencing the petitioner. Finally, the allegations of relief would not render the judgment of conviction void, but merely

voidable, and are not cognizable in a habeas corpus proceeding. See Passarella v. State, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994); Luttrell v. State, 644 S.W.2d 408, 409 (Tenn. Crim. App. 1982). The habeas corpus court correctly dismissed the petition. We conclude that this case contains no error of law requiring reversal of the judgment of the habeas corpus court. Accordingly, we grant the state's motion for an affirmance pursuant to Rule 20 of the Court of Criminal Appeals because this opinion does not have any precedential value.

For the reasons stated, the judgment of the habeas corpus court is affirmed in accordance with Rule 20 of the Court of Criminal Appeals.

D. KELLY THOMAS, JR., JUDGE